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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Haywood S. Gilliam, Jr., Judge

Oakland, California
Thursday, February 24, 2022

TRANSCRIPT OF TELEPHONIC PROCEEDINGS

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1 **Thursday - February 24, 2022**2 **2:30 p.m.**2 **P R O C E E D I N G S**3 **---000---**4 **THE CLERK:** Calling CV 21-4734, Gescheidt, et al. vs.
5 Haaland, et al. Parties please state your appearance.6 **MS. BARNEKOW:** This is Kate Barnekow for plaintiffs,
7 and with me on the line is Katherine Meyer.8 **MR. DEVITO:** Good afternoon, Your Honor. David DeVito
9 from the U.S. Attorney's Office on behalf of the defendants,
10 and also on the line with me is Matthew Rand from the
11 Environmental and Natural Resources Division at DOJ.12 **THE COURT:** Good afternoon to everyone.13 So we're here for a hearing on the parties' cross-motions
14 for summary judgment, and we had a detailed discussion at the
15 hearing on the motion for preliminary injunction, and so I'm
16 very steeped in the background of the case, and I've reviewed
17 your papers carefully and the cases that you all have cited.18 And so I'd like to focus the discussion on a couple of
19 points because I have a good understanding of the underlying
20 factual contentions that are being made, but I think there are
21 a couple of threshold questions that are where I would like to
22 spend our time today.23 And the first is the question of whether there is a
24 ministerial mandatory duty that is imposed by Section 100.502
25 of U.S. Code Section Title 54, and then really the second is

1 the standing question that the defendants have raised and
2 really with the focus on whether this statute that is the basis
3 for the APA claim here creates a procedural right that gives
4 rise to a cause of action from the standing perspective.

5 And so really the first question I think is for
6 Ms. Barnekow -- is so I'm looking at the statute, and it's
7 actually very brief, and the key language is that "general
8 management plans shall be prepared and revised in a timely
9 manner by the director." And it's your position that that --
10 the combination of the "shall" and the "timely manner" impose a
11 mandatory and non-discretionary duty under cases like *SUWA*, and
12 I -- really my question is when I look at a case from the Ninth
13 Circuit like the *ONRC* case that involves language that says
14 "when appropriate," how is "timely" any different? How is
15 "timely" a ministerial duty as opposed to one that vests
16 discretion in the agency?

17 **MS. BARNEKOW:** Thank you, Your Honor. This is Kate
18 Barnekow.

19 I would clarify that plaintiffs' contention is that the
20 mandatory duty arises from the combination of the term "shall"
21 which, of course, connotes a command as well as a discrete
22 action that the agency can take, which at issue here would be
23 the term "revised."

24 The phrase "in a timely manner" certainly goes to the
25 speed at which Congress expected the Park Service to act when

1 complying with its duty, but it is not our contention that the
2 phrase "in a timely manner" is what confers or, rather, what
3 creates the mandatory duty for the agency to act at all.

4 **THE COURT:** All right. So obviously you could have a
5 section that says the agency shall use its best discretion in
6 addressing issues, and in that instance, the "shall" won't
7 create a mandatory duty, would it?

8 **MS. BARNEKOW:** That's correct, Your Honor. So that
9 would be the sort of language that, as you mentioned, *SUWA* or
10 S-U-W-A contemplated where there was not a discrete agency
11 action contemplated by that language.

12 The language at issue in *SUWA* was that the agency was
13 tasked with continuing to do something, so in the same way that
14 "continuing to do something" is not a discrete action such that
15 "using best discretion" is not a discrete action. Those are
16 the sort of broad, overarching commands that do not give forth
17 a mandatory duty that would be reviewable under the APA.

18 What we have here is something different, is that the
19 agency shall revise the General Management Plan, which, again,
20 is a discrete action that has the clarity necessary
21 contemplated by *SUWA* to create that sort of mandatory duty for
22 the agency to act.

23 **THE COURT:** I'm not understanding how. When Congress
24 says "shall do it in a timely manner," what does that mean?

25 **MS. BARNEKOW:** Your Honor, that means that the -- that

1 the National Park Service is required to revise the General
2 Management Plan, just like the statute says. The phrase "in a
3 timely manner" goes to, again, the speed at which -- at which
4 Congress expects the agency to act, which is a factor under
5 TRAC, which I understand we're not discussing here.

6 And so those are the terms that give rise to duty. The
7 phrase "in a timely manner" is icing on the top of the cake, if
8 you will. The duty would be there regardless of that phrase.

9 Does that answer your question?

10 **THE COURT:** I think I understand what you're saying,
11 but when are you saying that there is a mandatory requirement
12 of a revision?

13 **MS. BARNEKOW:** So when the mandatory revision arises
14 would be a question for the TRAC factors, so the statute
15 provides the demands, in this case, both to issue and revise
16 the General Management Plan, and when the agency has failed to
17 do so, as we have here where the agency has failed for over 40
18 years to issue that revision, then we have to look to the TRAC
19 factors to determine whether that delay has been unreasonable.

20 **THE COURT:** Although -- but stepping -- and I
21 understand that that is an issue under TRAC, but that is only
22 one. There is a duty.

23 What I'm trying to understand -- let me maybe ask in a
24 hypothetical.

25 Is it your position that -- let's say this GNP was created

1 in 1980 and that there was a mandatory duty to revise it in
2 1981, regardless of any other factors.

3 **MS. BARNEKOW:** I would say that the duty to revise was
4 certainly there, Your Honor. Whether a claim had merit and
5 whether that delay at that point would have been unreasonable
6 under the TRAC factors is a separate question, regardless of
7 whether the duty was attached.

8 So in short, my answer is yes, but it -- that -- whether
9 that timing would be unreasonable under the Administrative
10 Procedure Act would be a separate question.

11 **THE COURT:** But I'm not even talking about the APA.
12 I'm talking about what the actual duty is, in your view, and
13 it -- and I'm not sure I'm understanding it, so I appreciate
14 hearing your perspective so I'm sure I understand it. But at
15 what interval do you say Congress required the agency to make
16 revisions?

17 **MS. BARNEKOW:** I understand your question, Your Honor,
18 and I'm sorry to keep going back to this point, but I think
19 that question as to when the agency is required to act is a
20 question under the Administrative Procedure Act. Our claim is
21 inextricably linked to the APA, and whether the agency acted in
22 an appropriate manner at an appropriate time has to go to the
23 TRAC factors. Whether or not the duty is there, which is -- I
24 understand is what you're asking about, comes purely from the
25 specific language of the statute which, as you noted,

1 specifically requires that the plans be revised.

2 I would say that the duty attached from the moment that
3 the -- that Congress passed this statute in 1980, and then the
4 question is when that delay became unreasonable.

5 I point to the administrative record on a couple of points
6 here, Your Honor, in that the question of when -- when it was
7 unreasonable for the Park Service to not have issued a
8 revision, there are a number of points to which that could have
9 attached. It could have attached in 1993 when the Park
10 Service's own scientific advisory panel warned them that should
11 they not take further actions, that dead and dying elk were
12 going to become more prevalent.

13 It could have attached in 1998 when the Elk Management
14 Plan noted specifically that further management actions were
15 needed, specifically at Tomales Point, in order to prevent
16 mortality caused by human impact, such as the fence
17 specifically at Tomales Point.

18 And it certainly could have attached by 2008 when that Elk
19 Management Plan expired by its own terms.

20 But regardless of all that, it certainly attached eight
21 years ago which, by the Park Service's own admission in their
22 declaration, which is at ECF No. 57-2, they said, quote, the
23 severity and the frequency of the two historic draughts that
24 have occurred within the last eight years, one of which we are
25 still in, require a new management plan that will include

1 resource and specific analysis to address elk herd management.

2 So there are a number of points here where that duty could
3 have attached, and under any of them, it's still an
4 unreasonable delay.

5 **THE COURT:** Why don't I hear from Mr. DeVito on this
6 duty question and the *SUWA* analysis.

7 **MR. DEVITO:** Thank you, Your Honor. I'll just start
8 with a couple of points.

9 I think that you're correct in viewing this sort of as a
10 threshold question as to whether this is an action that's
11 compelling under the APA pursuant to the Supreme Court's
12 decision in *SUWA*, and we -- I would say that the answer is
13 clearly that it is not, for the reasons that you're touching on
14 here.

15 The question is at what interval, and the statute's
16 direction in that regard is "in a timely manner," which clearly
17 confers the discretion on the agency to determine when it's
18 appropriate to do that. And that's the sort of thing that
19 takes it outside of the scope of an actionable claim under
20 7061.

21 And I think Your Honor is correct to look at some of the
22 cases that we cited in our briefing, including *ONRC*, because
23 the statutes at issue in those cases are very similar, and they
24 also include the word "shall," so "shall" isn't the thing that
25 says or doesn't say that a statute, you know, creates this

1 compellable duty. The question is, is it presently compellable
2 now or at any given time, and that's the question that I think
3 Your Honor appropriately touched on when you brought up the
4 question of whether was it compellable in 1981. The answer I
5 think is clearly no. And the -- but the point for present
6 purposes is that the statute confers that discretion on the
7 agency.

8 **THE COURT:** And I know that Judge Armstrong dealt with
9 this exact question some number of years ago, and I know that
10 that is not binding, though it's persuasive authority, and I
11 always view with consideration and respect the views that my
12 colleagues take, but what, in your view, was off about the
13 analysis in that earlier case?

14 **MR. DEVITO:** Your Honor, I think we explained this in
15 our papers, but I think the main issue, if you are reading
16 Judge Armstrong's decision on this point, is that when she --
17 to the extent that she addressed this question of whether the
18 statute confers discretion on the agency, her -- she cited
19 cases that arose under Section 555(b) of the APA which is not
20 at issue here. That's a statute that has to do with matters
21 that are what are called "presented to the agency," and so that
22 is sort of an independent source of imposing this question of
23 whether, you know, the agency's action is reasonable.

24 Here under -- under 706.1, we're not talking about a
25 matter that was, quote/unquote, presented to the agency, and so

1 looking, you know, at *SUWA*, the question there has to be, you
2 know, is this -- is this statute by itself, 54 U.S.C. 100.502,
3 something that could be compelled in the mandamus context based
4 on a present duty, and we think that, you know, the "in a
5 timely" manner clearly confers discretion on the agency and,
6 therefore, it's not, and that's the point that, with all due
7 respect, Judge Armstrong's opinion didn't address.

8 **THE COURT:** All right.

9 The other topic, as I mentioned, that I wanted to talk
10 about was the standing question and really one aspect of it.

11 I take the defendants' point that a number of the cases
12 that the plaintiff is discussing were NEPA cases, and obviously
13 NEPA has its own procedural standing provision, in essence.
14 But I take it that the -- the *Jackson Hole* case from the
15 District of Wyoming is the one that either party was citing
16 that dealt with a statute that is similar to ours and
17 dissimilar to NEPA. And that court directly held that the
18 petitioners didn't identify and the court couldn't find any
19 procedural rights that were granted to members of the public
20 under the statute that was at issue there, which was 16
21 United States Code Section 1(a) through 7, and the plaintiffs
22 responded to the case by saying it's just one district court
23 case.

24 But setting that aside, why is the reasoning of that case
25 inapposite? That's a question for the plaintiffs.

1 **MS. BARNEKOW:** Thank you, Your Honor.

2 I have several answers to your question. I first want to
3 clarify that NEPA does not always actually provide a right to
4 participate, so the contention that because this is not a NEPA
5 case it somehow does not afford a procedural injury I think is
6 incorrect.

7 But even beyond that, there are a number of Ninth Circuit
8 cases where standing, based on procedural injury, which is what
9 we have here where the Ninth Circuit found that there was
10 standing -- so I'm happy to point you to those cases under the
11 National Historical Preservation Act, for example, as well as
12 under the Endangered Species Act or under a state certification
13 program, none of which -- I'm sorry -- two of which, at
14 least -- two of which did not involve a right to participate
15 and none of which were under NEPA. So the idea that it's not
16 NEPA means that this sort of injury isn't applicable here I
17 think is incorrect.

18 **THE COURT:** Let me ask this. So what are those cases
19 that you think involve analogous statutes, and I will look
20 closely at them. I'm sure you have cited them in your brief,
21 but what are the two or three, in your view?

22 **MS. BARNEKOW:** Certainly. Thank you, Your Honor.

23 So we cited *Oregon National Desert Association vs.*
24 *Dombeck*, which is 172 F.3d 1092, which is Ninth Circuit 1998.
25 In preparation for this hearing, we also found two other cases

1 which I can point you to, the first being *Center for Biological*
2 *Diversity vs. Mattis*, which is 868 F.3d 803, Ninth Circuit
3 2017, and then the second is *Citizens for Better Forestry vs.*
4 *USDA*, 341 F.3d 961, which is Ninth Circuit 2003.

5 **THE COURT:** And those last two you didn't cite in your
6 brief?

7 **MS. BARNEKOW:** That's correct, Your Honor. We only
8 found them after final briefing was complete.

9 **THE COURT:** All right.

10 So why don't you continue.

11 **MS. BARNEKOW:** Thank you.

12 I also wanted to add, before continuing on, to the Wyoming
13 case that you brought up, but regardless, under the -- under
14 the requests that we're talking about today that the Park
15 Service comply with their duty to revise a General Management
16 Plan, there is, in fact, a NEPA process which defendants
17 themselves have acknowledged. So plaintiffs and others will,
18 in fact, have a chance for public participation in this
19 planning process, just as they would under NEPA and some of the
20 other cases.

21 But specifically talking about *Jackson Hole*, respectfully,
22 Your Honor, we think that that case was decided incorrectly.
23 But beyond that, it was based on reasoning that was very
24 specific to the Tenth Circuit. It relied heavily on *State of*
25 *Utah vs. Babbitt*, which is a Tenth Circuit case from 1998.

1 In that case, the plaintiffs' alleged injury was based on
2 their denial of participation in a process at a stage where
3 there was no statutory rights to participation, and so the
4 Tenth Circuit in that case found that plaintiffs had no
5 standing specifically because there was no right to participate
6 at that stage under the statute -- excuse me -- a notice in
7 common, particularly at that stage. And that is what *Jackson*
8 *Hole* primarily relies on for the contention that in order for
9 there to be a procedural injury, there must be some public
10 participation and notice in common.

11 But that is not the case in the Ninth Circuit. Rather, in
12 the Ninth Circuit, to satisfy the injury-in-fact requirement
13 for procedural requirements, "a plaintiff must only show" --
14 and I'm quoting here from *Central vs. City of Long Beach* --
15 "that the procedures in question are designed to protect some
16 threatened concrete interest."

17 In this case, that's exactly what we have. The statute at
18 issue is clearly designed to protect the concrete interests of
19 our plaintiffs. The statute specifically requires that the
20 Park Service take measures to, quote, preserve the area's
21 resources, the area's natural resources, which --

22 **THE COURT:** I mean, you're saying that the generic
23 purposes set out in Sections 1 through 4 are such as to confer
24 a specific -- or directed to a specific benefit for your
25 client?

1 **MS. BARNEKOW:** I wouldn't say that specific to our
2 clients, but I -- it is a concrete interest under the test
3 established for whether plaintiffs have procedural injury to
4 challenge the Government's failure to undertake a mandatory
5 process which, in this case, is the revision of the GMP.

6 **THE COURT:** Well, all right. I understand your
7 position. You can continue.

8 **MS. BARNEKOW:** Thank you, Your Honor.

9 Again, continuing in our discussion of *Jackson Hole*, I was
10 going to again point you to two of the cases that I just shared
11 with you, specifically *Center for Biological Diversity vs.*
12 *Mattis*, which is Ninth Circuit 2017, and *Citizens for Better*
13 *Forestry vs. USDA*, which was Ninth Circuit 2003, both of which
14 found that plaintiffs had standing to challenge -- to challenge
15 agency action under a theory of a procedural injury where the
16 statute at issue had no right to public participation or notice
17 and comment at all.

18 So while *Jackson Hole vs. Babbitt* was decided on a very
19 specific understanding of what a procedural injury is, that is
20 not what is binding in this circuit.

21 **THE COURT:** All right. Well, the way that the case
22 describes the Tenth Circuit precedent it was considering is
23 that "Petitioners have standing to challenge the agency's
24 compliance with the statute only if that statute provides them
25 with a procedural right whose transgression constitutes an

1 Article III injury in fact."

2 How, if at all, is that different from the Ninth Circuit's
3 law?

4 **MS. BARNEKOW:** Your Honor, again, this is where I
5 would point you back to the case that *Jackson Hole vs. Babbitt*
6 cites for that assertion which makes it very clear that the
7 court in that case is defining a procedural injury as one where
8 there is a right to public participation. It does not say it
9 in that particular quote, but that is what they're referring
10 to.

11 And that is why, in fact, defendants have argued
12 plaintiffs do not have -- do not have standing to challenge
13 this because there is no right -- because they have no right to
14 notice and comment in the revision of a General Management
15 Plan. So that's the distinction --

16 **THE COURT:** But that wasn't quite my question. That
17 phrase that I just read, do you think that that is the same or
18 different than the law in the Ninth Circuit?

19 **MS. BARNEKOW:** I'm sorry, Your Honor. Could you
20 repeat it just so I'm sure?

21 **THE COURT:** Sure. "Petitioners have standing to
22 challenge the agency's compliance with," and then they list the
23 statute, "only if that statute provides them with a procedural
24 right whose transgression constitutes an Article III injury in
25 fact."

1 **MS. BARNEKOW:** No, Your Honor. I wouldn't say they
2 have standing only if its transgression creates such an injury.
3 In this case, plaintiffs are injured by the Park Service's
4 failure to revise the General Management Plan, but I do not
5 believe that that is an accurate representation of the law as
6 it stands in the Ninth Circuit.

7 **THE COURT:** All right.

8 Why don't I ask Mr. DeVito to pick up on this point.

9 **MR. DEVITO:** Sure, Your Honor. David DeVito.

10 I think it is an accurate representation of the law in the
11 Ninth Circuit. I would refer you to the *Fernandez vs. Brock*
12 case that we cited in our papers. And that case makes it clear
13 that, you know, the crucial injury is not have you -- have you
14 alleged a violation of some statutory obligation. It's whether
15 that statute imposes some correlative procedural duty and right
16 that is specific to a given plaintiff, the violation of which
17 is sufficient to confer standing.

18 I think the *Jackson Hole* case specifically addresses this
19 and gets it correct, that the statute at issue here, you know
20 54 U.S.C. 100.502, doesn't do that. There is no evidence in
21 the record or in the legislative history or anywhere that that
22 was the intention of Congress in creating this statute, was to
23 confer rights in these plaintiffs, and so we think that, you
24 know, this is not an issue where oh, the Tenth Circuit law is
25 different. I think the Tenth Circuit case is consistent with

1 the Ninth Circuit law which is consistent with the Supreme
2 Court law on this question, which is that, you know, under --
3 and I think the Supreme Court case is *Summers vs. Earth Island*
4 *Institute*. You can't just identify some law that an agency
5 isn't following appropriately and -- and confer standing on
6 yourself. The question is whether there is procedural rights
7 in the plaintiff.

8 I think also, you know, the -- going back to some of the
9 authorities that the plaintiffs have cited, obviously most of
10 them are NEPA cases, and that's the distinction that I would
11 draw, is that NEPA does create those sorts of rights, was
12 clearly intended to create those sorts of rights and the
13 statute wasn't, but I think to the extent that there are other
14 cases like Endangered Species Act cases or Historic
15 Preservation Act cases, that's sort of the same situation,
16 which is all distinct from the statute that we have at issue
17 here, and that's what the Wyoming court in *Jackson Hole* was
18 addressing, and we think it got that correct.

19 **THE COURT:** Just looking at *Fernandez*, where, in your
20 view, is the clearest statement of the principle that you were
21 just talking about?

22 **MR. DEVITO:** Bear with me, Your Honor, if I can do
23 this on the fly. I think it's at page 630. The Court says,
24 "The foregoing demonstrates that a plaintiff who merely claims
25 a defendant violated a statutory duty does not necessarily

1 satisfy the requirement of injury in fact in Article III.
2 Instead, we hold that the crucial inquiry in such a situation
3 is whether a statute that imposes statutory duties creates
4 correlative procedural rights in a given plaintiff, the
5 invasion of which is sufficient to satisfy the requirement of
6 injury in fact in Article III."

7 **THE COURT:** I see it.

8 Do you have any other take on this standing question
9 that's based on the nature of the statutory and the procedural
10 injury that's alleged?

11 **MR. DEVITO:** No, Your Honor.

12 **MS. BARNEKOW:** Your Honor, can I respond to that?

13 **THE COURT:** Sure.

14 **MS. BARNEKOW:** Thank you.

15 I would point you as well to Footnote 7 of *Lujan*, in which
16 the Supreme Court made very clear that a person who has been
17 accorded a procedural right can assert that right, and, you
18 know, this goes to other standards without meeting the normal
19 standards of redressability and immediacy.

20 I would say, too, that plaintiffs are not arguing that
21 there is -- there needs to be no other facts on the ground to
22 assert injury other than a violation of law. Of course that
23 doesn't satisfy Article III.

24 What we have here is a statute that was specifically
25 designed to protect plaintiffs' interests in the natural

1 resources at historic park units. That is the concrete
2 interests that our plaintiffs have at Tomales Point, which
3 we've demonstrated amply through their standing declaration.

4 They have been injured because the National Park Service
5 has failed to comply with this process. It's not merely that
6 they have not -- that the Park Service has not complied with
7 their duty to revise the General Management Plan but, rather,
8 the impact that that has had on our plaintiffs.

9 So I would point you there again back to *Center for*
10 *Biological Diversity vs. Mattis*, which this sort of concrete
11 interest they say specifically can reflect a, quote, aesthetic
12 conservational and recreational value, which is exactly what we
13 have here.

14 So I don't think that there can be any real question that
15 the plaintiffs have a concrete interest in the preservation of
16 the area's resources, which is exactly what the statute at hand
17 contemplates and requires.

18 Moreover, whether or not there is a right to notice and
19 comment or public participation, which, again, was the question
20 in the Wyoming case relying on that Tenth Circuit opinion,
21 regardless, defendants themselves have admitted that this
22 process, should they undertake it, which they now say they have
23 committed to beginning the process, will require compliance
24 with NEPA and an environmental impact statement, which will
25 give plaintiffs and others the right to public participation.

1 So even if you accept the reasoning of Wyoming and -- out
2 of the Tenth Circuit, there is still a procedural injury here
3 that plaintiffs have suffered.

4 **THE COURT:** All right. I understand your position.
5 Thank you.

6 All right. Those are the questions that I had. Obviously
7 there is a lot in terms of the facts, but I think those are the
8 questions I am focused on.

9 And, really, then just one question for Mr. DeVito. And
10 I -- I saw that the agency is now intending to undertake a plan
11 revision, and it sounds like that will result in potentially
12 visions to the elk plan, but it's a multiyear process that's
13 proposed.

14 And I guess what I'm about to say is stepping away from
15 the doctrine and stepping away from whatever the ruling might
16 be in the case and however it might turn out, I take it that
17 everyone understands that it would not make sense for us to get
18 to 2025 and have that be a moot point because the elk herd is
19 gone. And that is, you know, whether the doctrinal piece of
20 this fits together exactly with what the plaintiffs are saying
21 or not, that is a concern that they are raising that seems to
22 me to be legitimate, not from the perspective of a -- that may
23 be detached from what the legal structure provides, but it's
24 not an unreasonable thing for them to be concerned about.

25 And so I'm just wondering on behalf of your client how

1 that concern and that public trust is consistent with the time
2 frame that you are proposing?

3 **MR. DEVITO:** Yes, Your Honor. David DeVito.

4 I think obviously that's a valid concern that the Park
5 Service shares. The Park Service certainly is not interested
6 in being in a position where there is no elk herd, and having
7 done all this work while in the interim, the situation on the
8 ground deteriorates to the point where there isn't one. Of
9 course -- and the Park Service is equally interested and
10 committed to going through this process to revise the elk plan
11 and, as appropriate, the General Management Plan for Tomales
12 Point.

13 And the point of doing all of that is to make sure that
14 the resources at the park, including the elk, are appropriately
15 managed. And you can rest assured that the Park Service will
16 continue to observe its duty to do that.

17 **THE COURT:** Is there any thought that has been given
18 in this case to whether some sort of a settlement discussion
19 with a magistrate judge, for example, might help the parties
20 identify some zone of overlapping interest, or is the thought
21 that there's just too much difference in terms of perspective
22 for that to work?

23 **MR. DEVITO:** Your Honor, this is David DeVito.

24 We have had some discussions, and I think it's probably
25 fair to say that although I think both parties are and were and

1 remain probably interested in settling the case if it were
2 possible, it -- we -- those discussions, I think, led us to
3 believe that we were not going to be able to do that.

4 **THE COURT:** Is that your take as well, Ms. Barnekow?

5 **MS. BARNEKOW:** Yes, Your Honor.

6 And if I may, would you want me to respond to the last
7 point made by defendants?

8 **THE COURT:** Sure.

9 **MS. BARNEKOW:** Thank you.

10 I would just like to point out -- and we and plaintiffs,
11 I'm sure, appreciate your concern and recognition of the very
12 real threat that by 2025, which as you recognized is the
13 timeline that the Park Service has proposed, at least at this
14 point -- by the time they'll complete this process, that the
15 elk won't exist anymore.

16 I would remind you that when we asked Your Honor for a
17 preliminary injunction and briefed that, the Park Service told
18 you that they, quote, stood ready to act to safeguard the
19 population at Tomales Point.

20 Since that happened, we found out that an additional 72
21 elk have died, and I know Your Honor said you're very familiar
22 with the facts on the ground. I don't mean to hammer this
23 point home, you know, too much.

24 **THE COURT:** I understand. But what I'm getting at is
25 I don't -- I have serious questions as to whether any of that

1 is the driver as to the legal answer, but I also -- and I -- I
2 take Mr. DeVito at his word, and I know that there is a dispute
3 as to what policy ought to be applied here. But, again, this
4 may be going beyond the scope of what's in front of me, but it
5 just does seem to me that one way or another -- and I don't
6 think the Government would dispute that -- that the
7 preservation of the herd has to be accounted for in some way,
8 and if that -- if that -- and I'm not getting into what the
9 details of that would be because I'm not a wildlife management
10 expert, but I -- what I was asking for is that recognition on
11 the part of the Government and the -- some indication that they
12 are cognizant of the issue. And I understand that the
13 plaintiffs' view is that they're not responding properly and
14 that there is -- there are a number of things the Court should
15 order that are different than what they're doing, and I get
16 that, so that is not something I need to hear more about.

17 But it just does seem to me to be a case that, setting
18 aside the legal dispute and setting aside the question of what
19 relief is within this Court's prior order and all of those
20 types of things, it seems to me that every one ought to have in
21 mind that the preservation of the herd and making sure that
22 that happens is important.

23 And I don't have reason to doubt that the Government
24 understands the obligation, and I also don't have reason to
25 doubt that there is a good-faith difference of opinion as to

1 what the right policy is and what needs to be done, and I get
2 that.

3 But I just wanted to make clear that -- that I do
4 understand that dimension of this and am hopeful that whatever
5 the outcome of the legal claims here, that's something that is
6 being given due importance and weight by the agency.

7 **MR. DEVITO:** Your Honor, this is David DeVito. I
8 might just be repeating myself, but I can assure you that the
9 Park Service understands the importance of that.

10 **THE COURT:** All right. So I don't have any other
11 questions.

12 Any closing comments from either of you?

13 **MS. BARNEKOW:** No, Your Honor. Thank you.

14 **MR. DEVITO:** This is David DeVito again.

15 No, thank you, Your Honor.

16 **THE COURT:** All right. I will take the motions under
17 submission, and I will aim to issue an order as soon as I can.
18 Thank you both for the argument.

19 (Proceedings adjourned at 3:11 p.m.)

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3 CERTIFICATE OF REPORTER

4 I certify that the foregoing is a correct transcript
5 from the record of proceedings in the above-entitled matter.

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7 DATE: Monday, May 22, 2023

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9 *Pamela Batalo Hebel*

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Pamela Batalo Hebel, CSR No. 3593, RMR, FCRR
U.S. Court Reporter

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